

FEDERAL COURT OF AUSTRALIA

Nguyen v Migration Review Tribunal [2008] FCA 524

MIGRATION – application for Partner (Migrant) (class BC) visa – visa application refused for absence of genuine and continuing relationship – whether the Tribunal breached obligations under ss 359A, 368(1), 360A – whether the Tribunal erred by not referring to every piece of evidence in reasons – whether the Tribunal decision not reasonable in weight given to certain evidence – appeal dismissed

Migration Act 1958 (Cth) s 359A, s360A, s 368, s476

Migration Regulations 1994 (Cth) r 1.15A

Duralla Pty Ltd v Plant (1984) 2 FCR 342 cited

Minister for Immigration v Jia Legeng (2001) 205 CLR 507 cited

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424 cited

Minister for Immigration v Eshetu (1999) 197 CLR 611 considered

Buck v Bavone (1976) 135 CLR 110 considered

Tolibao Cortes v Minister for Immigration and Multicultural Affairs [2001] FCA 1183 cited

Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham (2000) 74 ALJR 405 applied

**NHUT HONG NGUYEN v MIGRATION REVIEW TRIBUNAL and MINISTER FOR
IMMIGRATION AND CITIZENSHIP**
QUD 257 OF 2007

LOGAN J

18 APRIL 2008

BRISBANE

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

QUD 257 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: NHUT HONG NGUYEN
 Appellant**

**AND: MIGRATION REVIEW TRIBUNAL
 First Respondent**

**MINISTER FOR IMMIGRATION AND CITIZENSHIP
Second Respondent**

JUDGE: LOGAN J

DATE OF ORDER: 18 APRIL 2008

WHERE MADE: BRISBANE

THE COURT ORDERS THAT:

1. The Appellant have leave further to amend the notice of appeal so as to include further grounds 3, 4,5 and 6 as identified in Exhibit 1.
2. The appeal be dismissed.
3. The Appellant pay the Second Respondent's costs of and incidental to the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY**

QUD 257 OF 2007

BETWEEN: **NHUT HONG NGUYEN**
AND: **MIGRATION REVIEW TRIBUNAL**

JUDGE: **LOGAN J**
DATE: **18 APRIL 2008**
PLACE: **BRISBANE**

REASONS FOR JUDGMENT

1 This is an appeal from a decision of a Federal Magistrate by which an application by the Appellant for the judicial review of a decision of the Migration Review Tribunal (“the Tribunal”) was dismissed with costs. The Tribunal’s decision, in turn, had affirmed an earlier decision of the Minister for Immigration and Citizenship (“the Minister”) to refuse to grant to the Appellant what is known as a Partner (Migrant) (Class BC) visa.

2 The Appellant was born in Vietnam on 6 August 1971. His wife was born in Vietnam on 15 May 1979. She became an Australian citizen in 1992. She is his sponsor in respect of the visa application. The Appellant and his wife met in Vietnam in 1998. They commenced a relationship early in 2000. They married later that year on 4 April 2000. The Appellant entered Australia on 26 November 2002 on a Partner (provisional) (Class UF) Subclass 309 (spouse) Visa.

3 In terms of the regime established under the *Migration Act 1958* (Cth) (“the Migration Act”), the obtaining of a partner visa is a two stage process. An applicant must first hold a provisional visa in order to be granted a permanent visa. The provisional visa enables an applicant to travel to and remain in Australia on a temporary basis. A spouse visa confers a right of permanent residence.

4 On 1 July 2005, a delegate of the Minister refused to grant to the Appellant a partner visa. The gravamen of the delegate’s decision was an absence of satisfaction

that the appellant and his wife had a genuine and continuing relationship for the purposes of reg 1.15A of the *Migration Regulations 1994* (Cth) (“the Migration Regulations”).

5 Regulation 1.15A of the *Migration Regulations* is relevant in this way. It supplies a definition of “spouse” for the purposes of, materially, subclass 100 Spouse in schedule 2 to those regulations. There one finds criteria governing the eligibility for a grant of a permanent visa of the type in question. One of those criteria, found in cl 100.221, is that, at the time of the decision, “the applicant is the spouse of the sponsoring spouse”. Regulation 1.15A(1)(a) provides that a person is the spouse of another if the two are, *inter alia*, in a married relationship as described in subreg 1.15A (1A). That subregulation provides that persons are in a married relationship if they are married to each under a valid marriage, and:

- “(b) the Minister *is satisfied* that:
- (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
 - (ii) the relationship between them is genuine and continuing; and
 - (iii) they:
 - (A) live together; or
 - (B) do not live separately and apart on a permanent basis.”
- (emphasis added)

6 The Tribunal’s reasons disclose an extensive and detailed survey of the conflicting evidence placed before it with respect to the relationship the appellant and his wife. Having undertaken that survey, the Tribunal concluded that, on balance, it was not satisfied that the two of them resided together at the same address in a spousal relationship. The Tribunal was not satisfied that the Appellant and his wife had a mutual commitment to a shared life as husband and wife or that their relationship was genuine and continuing. That being so, the Tribunal pronounced that it was not satisfied the appellant was the spouse of the sponsor within the meaning of reg 1.15A of the *Migration Regulations*. The decision of the Minister’s delegate was therefore affirmed.

7 In the amended application which he filed in the Federal Magistrates Court, the Appellant identified the following grounds of review:

1. a denial of procedural fairness and, related to that, a breach of the obligations cast on the Tribunal by s 359A of the *Migration Act*;
2. a failure to take into account relevant considerations;
3. a misapplication of reg 1.15A of the *Migration Regulations*;
4. a breach of s 368(1) of the *Migration Act* constituted by an alleged failure to express any finding or reason for its ultimate conclusion;
5. that the Tribunal's decision was so unreasonable that no reasonable decision maker could have come to the same conclusion.

8 In the result, only the last two of these grounds were pressed before the Federal Magistrates Court, although, the learned Magistrate did consider the merits of other grounds in his reasons for judgment.

9 The submission made to the Federal Magistrate with respect to s 368(1) of the *Migration Act* was that the Tribunal had failed to set out the evidence or other material on which its ultimate findings were made, that unjust inferences had been drawn and that the Tribunal had failed to provide reason for the drawing of such inferences. His Honour concluded that there was a logical basis, adequately explained, for the Tribunal's decision remarking (Reasons paragraph 39); "the decision was premised upon facts, findings in respect of those facts and inferences drawn from those findings". A corollary of this was that the reasonableness ground was also found to be wanting in merit by the Federal Magistrate.

10 On appeal there was an absence of correlation between the grounds pleaded in the notice of appeal, those advanced in the Appellant's written submissions and those which came to be advanced orally at the hearing of the appeal.

11 In the appeal notice two grounds were advanced:

- (a) a breach by the Tribunal of its obligation under s 359A of the *Migration Act* constituted by an asserted failure on the part of the Tribunal to explain the relevance of material contained in a home visit report and certain photographs, "because the Tribunal merely said the information 'casts doubt on your claim

to have been co-habiting in a genuine and continuing spousal relationship with the spouse since the date on which you arrived in Australia” (I term this “appeal ground 1”);

- (b) that the learned Magistrate had erred in holding that the Tribunal was not required to refer to every piece of evidence placed before it (“I term this appeal ground 2”).

12 In written submissions the Appellant again asserted that the Tribunal had failed to comply with the obligation to give reasons imposed by s 368(1) of the *Migration Act* (I term this “appeal ground 3”). It was further submitted that the Tribunal, “was not reasonable in giving little weight to the evidence ‘created’ after the hearing” (I term this “appeal ground 4”). In the course of oral submissions on the hearing of the appeal two further grounds were sought to be added:

- (a) an alleged breach by the Tribunal of the requirement found in s 360A of the *Migration Act* to give to the appellant the prescribed (reg 4.21, *Migration Regulations*) 7 days notice of invitation to appear at the hearing (I term this “appeal ground 5”); and
- (b) an allegation that the Tribunal based its decision “merely on suspicion and conflicting evidence” and “ignored or gave little weight to the important evidence provided by the father” (I term this “appeal ground 6”).

13 Understandably, in light of the course of proceedings in the Federal Magistrates Court and in this Court until then, the Appellant’s desired pursuit of these yet further grounds came as something of a surprise to the Minister’s legal representatives. For convenience, I adopted the course at the hearing of the appeal of permitting brief oral submissions concerning them and of directing the parties to supplement those by an exchange of written submissions as to whether leave to amend the notice of appeal to raise them should be given and as to their substantive merits.

14 Each of the grounds not identified in the notice of appeal as originally filed was identified at the hearing in a proposed amended notice which became Exhibit 1 on the hearing of the appeal.

15 There was once a time when an appeal to a Full Court of this Court was conceived to be an appeal in a strict sense than rather than an appeal by way of rehearing, the root authority for the former proposition being *Duralla Pty Ltd v Plant* (1984) 2 FCR 342. That early conception is now regarded as erroneous: *Minister for Immigration v Jia Legeng* (2001) 205 CLR 507, at 533, [75], 544, [120] fn (98); *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 434-435, [20]. Even so, that is not a licence to conduct a case in the appellate jurisdiction of this Court as if there had been no exercise of an original jurisdiction or as if an appellant had not chosen to conduct his case in a particular way and on particular grounds in that jurisdiction. The conduct of the Appellant's case on appeal exhibited a tendency, by no means unique in appeals in matters arising under the *Migration Act*, to treat an appeal to this Court as if it were an exercise in the direct supervision by judicial review of an Administrative Tribunal, rather than an appeal from a judicial decision. Subject to s 75(v) of the *Constitution* and to exceptions in the Act which are not presently material, the judicial review role in respect of a decision of the Tribunal is consigned by s 476 of the *Migration Act* to the Federal Magistrates Court. It is that court which is invested with the relevant original jurisdiction.

16 In the final result, no further evidence was sought to be introduced in support of the proposed new grounds. Each was argued by reference to the evidence which was before the Federal Magistrates Court. The Minister has now had an opportunity of which he has taken advantage to make submissions on the merits of the further grounds. It seems to me that it is in the interests of justice to permit the notice of appeal to be amended to add each of them and to deal with each of the grounds on their merits.

17 I have emphasised the words "is satisfied" in the definition of "spouse" because they indicate that one of the "facts" upon the existence of which the Minister's power to grant this type of visa is conditioned is a state of Ministerial

“satisfaction” in respect of specified criteria. The following observations of Gummow J in *Minister for Immigration v Eshetu* (1999) 197 CLR 611 at 651, [130]-[131] are therefore apposite:

“The ‘jurisdictional fact’, upon the presence of which jurisdiction is conditioned, need not be a ‘fact’ in the ordinary meaning of that term. The precondition or criterion may consist of various elements and whilst the phrase ‘jurisdictional fact’ is an awkward one in such circumstances it will, for convenience, be retained in what follows. In *Bankstown Municipal Council v Fripp*, Isaacs and Rich JJ pointed out that, with the object of preventing litigation on questions of jurisdictional fact, the legislature may introduce into the criterion elements of opinion or belief by the decision-maker. ...

A determination that the decision-maker is not ‘satisfied’ that an applicant answers a statutory criterion which must be met before the decision-maker is empowered or obliged to confer a statutory privilege or immunity goes to the jurisdiction of the decision-maker and is reviewable under s 75(v) of the Constitution.” (internal footnote references omitted)

18 A “satisfaction” based administrative decision is amenable to judicial review on one or more of the bases described by Gibbs J (as his Honour then was) in *Buck v Bavone* (1976) 135 CLR 110 at 118-119:

“In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached.”

19 To this Gummow J added in *Eshetu*, supra at 654, [137]:

“This passage is consistent with the proposition that, where the criterion of which the authority is required to be satisfied turns upon factual matters upon which reasonable minds could reasonably differ, it will be very difficult to show that no reasonable decision-maker could have arrived at the decision in question. It may be otherwise if the evidence which establishes or denies, or, with other matters, goes to establish or to deny, that the necessary criterion has been met was all one way.”

20 Later in his judgement in *Eshetu*, supra at 656-657, [145] Gummow J stated:

“Where the issue whether a statutory power was enlivened turns upon the further question of whether the requisite satisfaction of the decision-maker was arrived at reasonably, I would not adopt the criterion advanced by Lord Wilberforce. I would prefer the scrutiny of the written statement provided under s 430 by a criterion of "reasonableness review". This would reflect the significance attached earlier in these reasons to the passage extracted from the judgment of Gibbs J in *Buck v Bavone*. It would permit review in cases where the satisfaction of the decision-maker was based on findings or inferences of fact which were not supported by some probative material or logical grounds.”

21 That the Appellant was lawfully married to his sponsor wife was a necessary but not sufficient pre-condition to the grant to him of a “spouse” visa. The further, “satisfaction” based criterion concerning whether or not that marriage was “genuine” offers a paradigm example of “a matter of opinion or taste”.

22 The summary in the Tribunal’s reasons of the evidence concerning the relationship between the Appellant and his wife discloses that that evidence was not all one way. In reaching its conclusion, its absence of “satisfaction”, the Tribunal pointed to a lack of financial pooling as between the Appellant and his wife, to their not naming one another as spouses on their respective taxation returns, to the regularity with which the Appellant stayed overnight at his aunt’s address rather than at the claimed matrimonial home and to there being little evidence until recently before the hearing of their naming one another in their respective wills or superannuation policies. The Tribunal gave little weight to evidence concerning the relationship after it became known that the genuineness of that relationship was in question. It was entitled to do this.

23 There is no want of logicity in the Tribunal’s reasons. Those reasons discharge the statutory obligation with respect to reasons cast on the tribunal by s 368 of the *Migration Act*, as the learned Magistrate correctly concluded. The Tribunal’s absence of “satisfaction” was based on evidence, not, as the Appellant contended, suspicion, cf *Tolibao Cortes v Minister for Immigration and Multicultural Affairs* [2001] FCA 1183. Appeal grounds 3, 4 and 6 fail.

24 The Appellant contends that the Tribunal should have referred in its reasons to receipts, letters, statutory declarations made by the Appellant, his spouse and their

friends, utility bills, photographs and two home videos. The law does not require this. The Tribunal is not obliged “to give a line by line refutation of the evidence for the claimant either generally or in those respects where there is evidence that is contrary to findings of material fact made by the Tribunal”: *Re Minister for Immigration and Multicultural Affairs; ex parte Durairajasingham* (2000) 74 ALJR 405 at 416, [65]. Appeal ground 2 fails.

25 Prior to reaching its decision the Tribunal sent to the Appellant a letter dated 9 August 2006 in which attention was drawn to and comment invited upon there being little substantive evidence in 2002 of a then continuing relationship, to the notes of field visits (copies of which were enclosed) to the claimed matrimonial residence which it was said raised doubts as to whether the Appellant and his wife resided together or were in a spousal relationship, to the Appellant’s inconsistencies in response at interview as mentioned in the Ministerial delegate’s reasons, to an absence of spousal identification on tax returns, to the Appellant’s having bills sent to his aunt’s address, to his wife’s having purchased a house in her own name and to the Appellant’s residing regularly at his aunt’s house.

26 The delegate had noted, inter alia, of the Appellant’s responses at interview, “the sponsor was emphatic that she did not want children” whereas, in the record of a previous hearing in the Tribunal, she had been recorded as saying that she and the Appellant, “love each other and plan to have children”.

27 In terms of s 359A of the *Migration Act*, the Tribunal’s letter gave to the Appellant “clear particulars of any information that the Tribunal considers would be the reason, or a part of the reason, for affirming the decision that is under review”. The Appellant was advised in the letter that the identified information might provide a reason or part of a reason for affirming the decision under review. The requirements of s 359A were met. As it happens, on 15 August 2006 the Appellant and his spouse made a detailed response to the issues raised in the letter. That they understood the potentially adverse importance of the matters raised or incorporated by reference in that letter is obvious from this response. Appeal ground 1 fails.

28 This leaves appeal ground 5. The Tribunal's hearing was conducted on 28 March 2006. If inviting an applicant to appear before it, the Tribunal was obliged by s 360A of the *Migration Act* to give him the prescribed 7 days notice of the day on which, and the time and place at which, he was scheduled to appear. On 7 March 2006 a letter of that date was sent to the Appellant specifying the time and place of the hearing but giving its date as 28 February 2006. He called the registry on 9 March 2006 to clarify the date of the hearing and was told that the specification of February was erroneous, the correct hearing date being 28 March 2006. That the Appellant was in no doubt that the letter of 7 March was offering a hearing by the Tribunal on 28 March 2006 is apparent from a request he made for a hearing on 28 March 2006, which was received by the Tribunal on 21 March 2006.

29 In the events which transpired, the Appellant was given more than seven days notice of the hearing in writing. The erroneous and obvious error in the specification of the date, while lamentably careless, did not in fact mislead him as to what was the hearing date. He knew more than 7 days before 28 March that the letter of 7 March was offering a hearing on 28 March. He was given the prescribed notice by the required means. In these circumstances, it is neither necessary nor appropriate to consider, in relation to the validity of the Tribunal's decision or the granting of relief, what might be the ramification in light of the later events which have transpired from the Appellant's attendance at the hearing before the Tribunal up to and including his belated reference to s 360A before this Court, of any non-compliance with the terms of that section. Appeal ground 5 fails.

30 It follows that the appeal must be dismissed, with costs.

I certify that the preceding thirty
(30) numbered paragraphs are a true
copy of the Reasons for Judgment
herein of the Honourable Justice
Logan.

Associate:

Dated: 18 April 2008

Solicitor for the Appellant: S Nguyen

Counsel for the Second
Respondent: S Brady

Solicitor for the Second
Respondent: Clayton Utz

Date of Hearing: 21 February 2008

Date of Judgment: 18 April 2008